

MEMORANDUM

TO: File

FROM: Legal Department

DATE: March 6, 2006

RE: *Title 32: Statutory Funding Options*

1. Augment Funding for the Current Drug-Interdiction Program Implemented Under Section 112

Federal funding is currently provided to the Arizona National Guard for the implementation of a drug interdiction program in accordance with the provisions of Title 32, Section 112. This section provides that the Secretary of Defense may grant funding to the Governor of a State pursuant to the submission of a “drug interdiction and counter-drug activities plan” that satisfies certain statutory requirements. *Id.* The Secretary of Defense is charged with examining the sufficiency of the drug interdiction plan, and determining whether the distribution of funds would be proper. 32 U.S.C.A. §112(d).

Arizona’s current drug-interdiction plan addresses Arizona’s threats and vulnerabilities, and specifically delineates operational guidelines to counter these exposed areas. In addition to the specific drug intervention tactics, the plan also recognizes related border issues created by human smuggling and terrain vulnerabilities with respect to the illegal entry of aliens into the United States. Having authorized Arizona’s Drug-Interdiction Plan, the Secretary of Defense enabled the Arizona National Guard to engage in border security functions. As such, these border security measures can be further strengthened by simply increasing the funding levels to the “drug-interdiction” program for the purposes of augmenting resources in the border security arena.

2. Independent Implementation of Section 502(f)

Historically, Title 32, Section 502(f), has been used to expand the operational scope of the National Guard beyond their “general duties.” Specifically, it allows a member of the National Guard to perform “training or other dut[ies]” in addition to those they are already prescribed to perform. 32 U.S.C.A. §502(f). Where Section 502(f) is devoid of limiting language requiring any specific emergency declarations or mission obligations, the statute can be implemented independently, and interpreted to apply to any “other duty,” including use of National Guard forces to bolster border security efforts in the State of Arizona. Such an expansive use was exemplified during the Katrina Disaster Relief Effort. There, National Guard forces provided additional “duties” under this

section, and received federal funding and benefits, while remaining under the authority of the respective Governors. *Hurricane Katrina: DOD Disaster Response*, CRS Report for Congress (09/19/2005).

3. Border Security Funding Established through a Memorandum of Agreement (“MOA”) between the Department of Homeland Security and the Department of Defense

In February of 2002, Immigration and Naturalization Services signed a Memorandum of Agreement (“MOA”) with the Department of Defense for limited Border Patrol support. This agreement resulted in the Department of Defense financially and logistically supporting National Guard forces on both the Canadian and Mexican borders.

To fund security on the Arizona-Mexico Border, an analogous funding MOA could be established. The Department of Homeland Security (“DHS”) would transfer funds to the Department of Defense (“DoD”), who would then provide National Guard assistance to the State of Arizona for security purposes on the Arizona-Mexico Border.

4. Implementation of Chapter 9

Title 32, Chapter 9 of the United States Code authorizes the Secretary of Defense to provide federal funding to a State, under the authority of the Governor of that State, for the use of their National Guard forces if there is a “necessary and appropriate” “homeland defense activity.” 32 U.S.C.A. §905. A “homeland defense activity” is statutorily defined as:

“an activity undertaken for the military protection of the territory or domestic population of the United States, or of infrastructure or other assets of the United States determined by the Secretary of Defense as being critical to national security, from a threat or aggression against the United States.” 32 U.S.C.A. §901.

The Code vests discretion in the Secretary of Defense to determine what constitutes a “homeland defense activity,” and further, whether federal funding should be provided to that State pursuant to 32 U.S.C.A. §905. This discretion, awarded to the Secretary of Defense in observance of compliance with Section 903, requires that he promulgate regulations giving State Governors direction and instruction for the implementation of this Chapter. See 32 U.S.C. §903 (“[T]he Secretary of Defense shall prescribe regulations to implement this chapter.”). In the absence of Federal direction and regulatory guidance, State Governors seeking Federal relief are forced to speculate as to the scope and reach of this statute. Under such circumstances, the Secretary of Defense must apply the scope of this Chapter liberally.

Furthermore, it is significant that the porous nature of the Arizona-Mexico Border plainly constitutes a “threat or aggression” against the United States pursuant to the Department of Defense’s ongoing commitment to the implementation of anti-terrorism tactics. A

2003 House of Representatives Report specifically addresses the need for both the Department of Homeland Security and the Department of Defense to coordinate efforts with regards to:

“such important activities as border defense, use of actionable intelligence, plans for use of the national guard as a first responder, and development of vaccines and various other countermeasures that have been suggested to the committee.” H.R. Rep. 108-106 (2003), 354-355 (emphasis added).

Such an interpretation is supported by the legislative history behind this statute as well as national security rhetoric which collectively emphasize the importance of border defense as a priority for the successful protection of our nation. It is thus utterly incomprehensible to assert that border defense does not fit squarely into the statutory language defining a “homeland defense activity.”